

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of General Communication, Inc. for	)	WT Docket No. 16-402
Waiver of Lower 700 MHz Band Interim and End-	)	
of-Term Geographic Construction Benchmarks for	)	
Alaska A-Block License WQJU656	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 28, 2018**

**Released: March 5, 2018**

By the Commission:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we deny an application for review, filed by the Rural Wireless Association, Inc. (RWA),<sup>1</sup> of a Wireless Telecommunications Bureau (Bureau) Mobility Division (Division) *Order*.<sup>2</sup> In that *Order*, the Division granted The Alaska Wireless Network, LLC (AWN)—which is a wholly-owned subsidiary of General Communication, Inc. (GCI)—a limited conditional waiver of Section 27.14(g) of the Commission’s rules regarding AWN’s A-Block license, WQJU656 (Basic Economic Area (BEA) 171 – Anchorage, AK) (the License).<sup>3</sup> Absent the waiver, AWN would have been required to serve 35 percent of the geographic area of the License area—which comprises the entire State of Alaska—by December 13, 2016, or have its end-of-license term and related 70 percent geographic-area construction requirement accelerated by two years, to June 13, 2017. In light of the combination of factors in this case set forth below, we find that RWA has failed to demonstrate that the *Waiver Order* warrants review under Section 1.115 of the Commission’s rules.<sup>4</sup> We affirm and amplify the Division’s finding that strict application of Section 27.14(g)(1) here would frustrate the rule’s underlying purpose and that grant of the conditional waiver will serve the public interest, including by facilitating the introduction of wireless broadband services in BEA171. We likewise affirm and amplify the Division’s finding that strict application of Section 27.14(g)(1) would be contrary to the public interest in this case, given the unique challenges of serving this rural Alaska BEA—including challenges that the Commission has broadly recognized in other contexts concerning Alaska.<sup>5</sup>

<sup>1</sup> Application for Review of the Rural Wireless Association, Inc., WT Docket No. 16-402 (filed July 6, 2017) (Application for Review). RWA is a trade association representing rural wireless carriers that each serve fewer than 100,000 subscribers. See Rural Wireless Association, About Us, <http://ruralwireless.org/about-rwa/>.

<sup>2</sup> See *The Alaska Wireless Network, LLC, Request for Waiver of Section 27.14(g)*, WT Docket No. 16-402, Letter Order, 32 FCC Rcd 4728 (WTB Mobility Div. 2017) (*Waiver Order*).

<sup>3</sup> 47 CFR § 27.14(g).

<sup>4</sup> 47 CFR § 1.115.

<sup>5</sup> See, e.g., *Connect America Fund; Universal Service Reform – Mobility Fund; Connect America Fund - Alaska Plan*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 10139, 10162, para. 72 (2016) (*Alaska Plan*) (citing *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17829, para. 507 (2011) (*USF/ICC Transformation Order*), *aff’d sub nom.* Direct Communications Cedar Valley, LLC, et al., 753 F.3d 1015 (10th Cir. 2014)).

## II. BACKGROUND

2. *Section 27.14(g)(1)*. In the *700 MHz Second Report and Order*, the Commission adopted interim and end-of-license term construction benchmarks for certain 700 MHz band licensees.<sup>6</sup> The Commission required Lower 700 MHz band A and B Block licensees to provide signal coverage and offer service over at least 35 percent of their license area by June 13, 2013,<sup>7</sup> later extended to December 13, 2016<sup>8</sup> (Interim Construction Requirement), and to provide signal coverage and offer service over at least 70 percent of that area by the end of their initial 10-year license term, here June 13, 2019 (Final Construction Requirement).<sup>9</sup> Section 27.14(g)(1) provides that, if a licensee does not satisfy the Interim Construction Requirement of 35 percent, its license term will be reduced by two years, thereby requiring it to meet the Final Construction Requirement of 70 percent two years sooner.<sup>10</sup> Further, if a licensee does not meet its Final Construction Requirement (whether or not accelerated) as required by Section 27.14(g)(1), it will be subject to a “keep-what-you-serve” rule under Section 27.14(g)(2), whereby its “authorization will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service, and those unserved areas will become available for reassignment by the Commission.”<sup>11</sup>

3. *AWN’s Waiver Request*. On December 7, 2016, GCI requested a waiver of Section 22.14(g)(1) on behalf of AWN,<sup>12</sup> proposing alternative construction benchmarks based on population instead of geographic area; it also proposed related commitments for the License.<sup>13</sup> AWN had acquired the License, whose area covers the entire State of Alaska, from the prior licensee in June 2016<sup>14</sup> In its Waiver Request, AWN specifically proposed that it be permitted to satisfy the Interim Construction Requirement by covering 50 percent of BEA171’s population (i.e., 50 percent of the population of Alaska) by December 13, 2016, and the Final Construction Benchmark by covering 80 percent of BEA171’s population (i.e., 80 percent of the population of Alaska) by June 13, 2019.<sup>15</sup> In addition, AWN committed to continue serving 80 percent of Alaska’s population for “five years beyond December 16,

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<sup>6</sup> See *Service Rules for 698-746, 747-762, and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*), upheld on reconsideration, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 2671 (2013) (*700 MHz Reconsideration Order*).

<sup>7</sup> See 47 CFR § 27.14(g).

<sup>8</sup> See *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122, 15151-52, para. 64 (2013).

<sup>9</sup> See 47 CFR § 27.14(g); see also *700 MHz Second Report and Order*, 22 FCC Rcd at 15293-94, 15349, paras. 6, 157.

<sup>10</sup> 47 CFR § 27.14(g)(1).

<sup>11</sup> *Id.* § 27.14(g)(2); see also *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, 15349, para. 153.

<sup>12</sup> Herein, we reference GCI and AWN collectively as AWN.

<sup>13</sup> Petition of General Communication, Inc. for Waiver of Lower 700 MHz Band Interim and End-of-Term Geographic Construction Benchmarks for Alaska A-Block License WQJU656, ULS File No. 0007499041 (filed Dec. 7, 2016) (citing 47 CFR § 27.14(g) (Waiver Request). See also Reply Comments of General Communication, Inc., filed Jan. 13, 2017 (AWN Reply).

<sup>14</sup> Triad 700, LLC (Triad) was the original holder of the License. See ULS File No. 0003382993. Triad assigned the license to T-Mobile License LLC (T-Mobile) in 2014. See ULS File No. 0006470607. T-Mobile assigned the license to AWN in 2016 (the Commission approved the assignment of the License on June 22, 2016). See ULS File No. 0006826907.

<sup>15</sup> Waiver Request at 8.

2018.”<sup>16</sup> AWN stated that it would focus resources on “rural, but populated, portions of the state – many of which desperately need greater access to wireless broadband.”<sup>17</sup> AWN also argued that “application of the rule would actually discourage rural deployment of Lower 700 MHz spectrum, frustrating the underlying purpose of the rule.”<sup>18</sup>

4. AWN further proposed that, in the event it is unable to cover 80 percent of Alaska’s population by June 13, 2019, “or is not able to maintain this level of coverage for five years thereafter,” it would lose authorization to serve those geographic portions of BEA171 where AWN was not providing service by June 13, 2017.<sup>19</sup> Finally, AWN committed to negotiating in good faith—during any renewal term—with any third party seeking to lease spectrum in unserved areas of BEA171.<sup>20</sup> It asserted that the requested waiver relief would be appropriate under both prongs of the waiver standard set forth in Section 1.925(b)(3)(i) and (ii) of the Commission’s rules.<sup>21</sup>

5. The Waiver Request appeared on public notice for comment on December 12, 2016.<sup>22</sup> Two parties, AT&T Services, Inc., and King Street Wireless, L.P., filed in support of the Waiver Request, citing unique conditions in Alaska such as extreme weather and geography.<sup>23</sup> One party, RWA, filed in opposition, arguing that a waiver grant would undermine “the underlying purpose of Section 27.14(g) . . . to prevent the warehousing of spectrum” and “would incent licensees to ignore their buildout obligations”; it also argued that no unique or special circumstances exist in Alaska warranting the requested relief.<sup>24</sup> In reply, AWN noted that “RWA does not dispute that [AWN] is working hard to build out its license in Alaska,” and asserted that, given its “existing investment in nearby infrastructure,” it is best positioned to “introduce[] competitive services to the vast majority of Alaskans, including consumers in numerous rural areas.”<sup>25</sup>

6. *Waiver Order.* The Division issued the *Waiver Order* on June 6, 2017, finding that granting AWN a waiver of Section 27.14(g) pursuant to Section 1.925(b)(3)(i) and (ii)<sup>26</sup>—subject to performance and related conditions—would serve the public interest, and that strict application of Section 27.14(g) would frustrate its fundamental underlying purpose “to better promote access to spectrum and

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 9.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* (stating that good faith negotiations would include, “among other things and by way of example only, terms providing for reasonable market-based lease rates, term periods, and build requirements similar to those proposed in this docket and in . . . Section 27.14(g),” adding (*see id.* at 9) that, in the event the Commission makes a finding that AWN failed to meet the good-faith negotiations commitment, it “could subject [AWN] to loss of authorization to serve the unserved areas as of the date of the finding.”).

<sup>21</sup> *Id.* at 9 (citing 47 CFR § 1.925(b)(3)).

<sup>22</sup> See *Wireless Telecommunications Bureau Seeks Comment on Alaska Wireless Network Request for Waiver of Geographic Coverage Requirement for 700 MHz License in Alaska*, Public Notice, 31 FCC Rcd 13137 (WTB Mobility Div. 2016).

<sup>23</sup> See Comments of AT&T, filed Jan. 3, 2017; Reply Comments of King Street Wireless, L.P., filed Jan. 13, 2017.

<sup>24</sup> Comments of the Rural Wireless Association, Inc., filed Jan. 3, 2017, at 3, 6 (RWA Comments).

<sup>25</sup> AWN Reply at 2, 5, 6.

<sup>26</sup> A waiver is appropriate under Section 1.925(b)(3) if the request meets the criteria under either subsection (i) or the criteria under subsection (ii). Here the Division supported its decision with two independent sets of factual findings, *i.e.*, that the waiver request satisfied each prong of the applicable rule. See *Waiver Order*, 32 FCC Rcd at 4730 (citing 47 C.F.R. § 1.925(b)(3)). To the extent necessary, we clarify that reliance on either of these findings would support affirming that grant.

the provision of service, especially in rural areas.”<sup>27</sup> The Division noted the unique challenges of serving Alaska, including those observed by the Commission in other contexts: its remoteness, lack of roads, challenges and costs associated with transporting fuel, lack of scalability per community, extremely limited satellite and backhaul availability, daunting weather conditions, challenging topography, short construction season, and widely dispersed population, as well as how the vast majority of the area in Alaska (i.e., the License area) is rural.<sup>28</sup> In light of the totality of these features, the Division concluded that strict application of Section 27.14(g) to AWN would be contrary to the public interest.<sup>29</sup> The Division thus concluded that, in this case, AWN satisfied both prongs of the waiver standard under Section 1.925(b)(3) of the Commission’s rules.

7. To ensure that the public interest benefits of the waiver would be realized by Alaskans, including those in isolated areas of the State, the Division established population-based benchmarks and imposed several related conditions. First, the Division ordered that the waiver relief would be effective only if AWN could demonstrate that it provided signal coverage and offered service to at least 50 percent of Alaska’s population by December 13, 2016, and if AWN failed to meet this initial benchmark, its license term would be reduced by two years, to June 13, 2017, and its authorization would automatically terminate without Commission action for those geographic portions of the License area in which AWN was not providing service by June 13, 2017; those unserved areas would then become available for reassignment by the Commission.<sup>30</sup>

8. The Division also ordered that AWN must: (1) provide signal coverage and offer service to at least 80 percent of Alaska’s population by June 13, 2019; (2) maintain such coverage and service (i.e., to at least 80 percent of Alaska’s population) for a minimum of five years, commencing June 13, 2019 (i.e., until at least June 13, 2024); and (3) negotiate in good faith with any third party seeking to lease or acquire spectrum in an area not served by AWN in BEA171.<sup>31</sup> The Division specified that, in the event AWN fails to satisfy any of these performance conditions, its authorization for the License will automatically terminate, without Commission action, for those geographic portions of the License area in which AWN was not providing service by June 13, 2017—the accelerated end-of-license term for the License absent the Division’s waiver of Section 27.14(g).<sup>32</sup> Specifically with respect to third-party negotiations, the *Waiver Order* states that, “[i]f the Bureau finds that AWN failed to negotiate in good faith, its authorization will automatically terminate, without Commission action, for that relevant geographic area of the License subject to the negotiation, and that unserved area will become available for reassignment by the Commission.”<sup>33</sup> In addition, the *Waiver Order* required AWN to file, by June 28, 2017, a showing demonstrating its geographic coverage area as of June 13, 2017, such that staff (and interested parties) may determine AWN’s served geographic portion of BEA171 as of June 13, 2017, in

<sup>27</sup> *Waiver Order*, 32 FCC Rcd at 4730 (citing *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, para. 153, adding that the Commission also stated that Section 27.14(g)’s performance requirements “will provide all licensees with incentives to serve more rural communities” and “are the most effective way to promote rapid service to the public, especially in rural areas” (citing *700 MHz Second Report and Order*, 22 FCC Rcd at 15349, para. 155)).

<sup>28</sup> *Id.*, 32 FCC Rcd at 4731-32.

<sup>29</sup> *Id.*, 32 FCC Rcd at 4730.

<sup>30</sup> *Id.*, 32 FCC Rcd at 4735. On Dec. 27, 2016, AWN timely filed a notification of construction, demonstrating that it had exceeded this benchmark by covering more than 54 percent of the population of Alaska. See FCC File No. 0007601845. Staff have reviewed and accepted this filing.

<sup>31</sup> *Waiver Order*, 32 FCC Rcd at 4736 (providing for a limited exception, ruling also that, if AWN violates this continuity of coverage condition, “it must provide written notice to the Commission.”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (stating, *see id.* n.81, that “while AWN committed to negotiate in good faith only during a license renewal term (Waiver Request at 2, AWN Reply at 6), we are requiring it to do so during the current license term as well. By way of example, good faith negotiations require, among other things, reasonable, market-based rates.”).

the event AWN fails to meet a waiver condition and becomes subject to Section 27.14(g)(2)'s "keep-what-you-use" provision.<sup>34</sup>

9. *Application for Review.* On July 6, 2017, RWA filed its Application for Review, arguing that the *Waiver Order* does not meet the waiver standard under either Section 1.925(b)(3)(i) or Section 1.925(b)(3)(ii) and should be overturned.<sup>35</sup> Reiterating that the purpose of Section 27.14(g) is to prevent spectrum warehousing, RWA argues that the *Waiver Order* undermines that purpose by "allowing AWN to retain the exclusive right to serve the approximately 97.5 percent of the geographic area of BEA171 that remains unserved more than seven and one-half years after the license was granted" and "will in all likelihood remain unserved even if all the conditions set forth in the [*Waiver Order*] are met."<sup>36</sup> Disputing the uniqueness of Alaska as a basis for the waiver, RWA asserts that its members "serve other remote rural areas of the country that present similar challenges and these members have worked diligently to meet the Commission's construction deadlines;" it also asserts that the challenges faced by Alaska providers "were well known" not only to the winning bidder of the License and its subsequent assignee, but also to AWN when it acquired the License in June 2016.<sup>37</sup> On these grounds, RWA contends that the *Waiver Order* fails under Section 1.925(b)(3)(i). RWA notes that the Commission specifically rejected population-based benchmarks for the licenses in this band, finding population-based benchmarks suitable only for larger Regional Economic Area Group (REAG) licenses, and choosing "instead to require carriers to maximize geographic coverage within their markets . . . ."<sup>38</sup> According to RWA, the Commission's decision to adopt Section 27.14(g)'s "keep-what-you-use" rule took into account the fact that certain CMAs and EAs, such as BEA171, "might be too large or challenging for a single operator to serve," and adopted the rule "to ensure that spectrum can be put to use in unserved areas by providers other than the licensee."<sup>39</sup>

10. RWA also argues that the *Waiver Order* fails under Section 1.925(b)(3)(ii) because, while "Alaska is large, rural, low density, and subject to weather extremes, it is not entirely unique in this regard," and the Commission declined to adopt special build-out provisions for Alaska and other areas that present similar challenges.<sup>40</sup> Moreover, RWA asserts, AWN could still continue to expand service within the License area absent the waiver relief, as "it would remain free to apply" to reacquire spectrum relinquished in BEA171 for reassignment under Section 22.14(j)(2), and the "only advantage AWN would lose is the ability to keep other providers from serving the unserved portions of BEA171."<sup>41</sup> Giving AWN this advantage does not, RWA contends, "support either the public interest or the policies that underlie the rules."<sup>42</sup> Regarding the *Waiver Order*'s condition that AWN must engage in good faith negotiations with any third party that seeks to serve an unserved area of BEA171, RWA argues that it is

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<sup>34</sup> *Id.* AWN timely filed this showing as a notification of construction (*see* FCC File No. 0007833825), but subsequently, at the staff's request, re-filed the requisite showing as a modification application (*see* FCC File No. 00078412141). Staff have reviewed and accepted this showing.

<sup>35</sup> *See* Application for Review at 5.

<sup>36</sup> *Id.* at 6, 10. RWA also introduces a new purpose underlying Section 27.14(g) for the first time in its Application for Review in this proceeding, asserting that the rule is intended to "provide competing service providers with an opportunity to put that spectrum into service in some or all of the areas left unserved by the licensee." *Id.* at 3.

<sup>37</sup> *Id.* at 7.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 10-11 (citing, at 11, *700 MHz Second Report and Order*, 22 FCC Rcd at 15348-49, paras.155-156).

<sup>40</sup> *Id.* at 10 (citing *700 MHz Second Report and Order*, 22 FCC Rcd at 15349, para.158).

<sup>41</sup> *Id.* at 14 (citing 47 CFR § 27.14(j)(2)).

<sup>42</sup> *Id.*

“another windfall” for AWN, rewarding it for failing to meet its buildout obligations.<sup>43</sup> RWA asserts that the burdens of serving Alaska “would be magnified when faced by third party providers that would be required to expend not only the capital costs to provide service to sparsely populated unserved areas, but also incur the expense to acquire spectrum rights from AWN and pay AWN to lease spectrum.”<sup>44</sup> According to RWA, negotiations with AWN “would invariably drag on for months with no guarantee that an agreement would ever be forthcoming,” delaying service to unserved areas and new communities by potential third-party providers and imposing additional expenses on them prior to any offering of service.<sup>45</sup>

11. On July 21, 2017, AWN filed an opposition to the Application for Review, endorsing the Division’s conclusions as to why the requested waiver relief is warranted.<sup>46</sup> AWN also states that “T-Mobile, and previous licensees, had not begun any construction in Alaska, leaving AWN with the impossible task of meeting the Commission’s build-out requirements on a highly compressed schedule.”<sup>47</sup> It disputes RWA’s assertion that the build-out challenges in Alaska are not unique, asserting that the difficulties “are both greater in degree and different in kind from those anywhere else in the nation.”<sup>48</sup> Noting the extreme temperatures that were cited in the *Waiver Order*, particularly in northern Alaska, AWN argues that “construction is only possible for about three months out of the year, a striking difference from the remainder of the country . . . .”<sup>49</sup> AWN further describes difficulties getting electrical and construction equipment and other supplies requiring reliance on deliveries by helicopter, which “make[ ] build-out a very different endeavor [in Alaska] than in the remainder of the country.”<sup>50</sup> AWN also emphasizes the vast size of Alaska, noting that, with a land area of about 1.5 million square kilometers, BEA171 is “more than twice the area of Texas” and is the largest BEA in the United States—“more than 10 times larger than the second largest BEA”—with most of the area uninhabited.”<sup>51</sup> Absent the waiver, AWN contends, “it would have been unable to invest in the wireless infrastructure needed to serve any area that it was not certain to be able to serve by June 13, 2017 . . . , even if coverage would have been possible soon thereafter.”<sup>52</sup> According to AWN, a carrier “must scale” backhaul, retail capacity, billing systems, staff, and other associated expenses “to match future network deployments.”<sup>53</sup> It asserts that any geographic area that it “was not confident it would be able to serve by the June 13[, 2017] deadline could not rationally be included in its near-term network plan,” as such area would have been, under strict application of Section 27.14(g), subject to applications and claims by other providers.<sup>54</sup>

12. Regarding RWA’s argument that the Commission specifically declined to adopt population-based benchmarks for Lower 700 MHz markets, AWN reiterates that its state-wide BEA-

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<sup>43</sup> *Id.* at 16.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 15 (asserting that the “requirement to negotiate in good faith is not the same as requiring a party to make a deal” and can thus carry its own difficulties) (citing *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327 (2015)).

<sup>46</sup> See generally AWN Opposition.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 3-4.

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 11-12.

<sup>53</sup> *Id.* at 12.

<sup>54</sup> *Id.*

based License area is “coextensive with REAG7, and larger than the large majority of REAGs in the United States.”<sup>55</sup> According to AWN, “[t]his strongly suggests that Commission policy,” as reflected in the Commission’s adoption of population-based buildout requirements for REAGs, “is aligned with the [Division’s] decision to apply a strict population-based build-out requirement in this case.”<sup>56</sup> AWN also disputes RWA’s claims that the *Waiver Order* does not satisfy the waiver standard under Section 1.925(b)(3)(ii), contending that all the factors that make providing statewide 700 MHz commercial wireless serve in Alaska so challenging—in combination—“plainly constitutes a unique circumstance . . . .”<sup>57</sup> AWN highlights its obligation under the *Waiver Order* to cover 80 percent of Alaska’s population by June 13, 2019, which, it notes “as a matter of simple arithmetic” means that AWN will be obligated to cover a large portion of the State’s rural population by that deadline; and if it does not, it would lose its authorization for any area not served by June 13, 2017, “potentially squandering two years’ worth of investment.”<sup>58</sup>

13. On August 3, 2017, RWA filed a reply to AWN’s Opposition, largely reiterating the arguments in its Application for Review, emphasizing its contention that the waiver is not necessary because, “[b]y enforcing the rule as written, the FCC will open up vast unserved areas in [BEA171] to all competing service providers, including AWN.”<sup>59</sup> RWA argues that infrastructure investment would, consequently, be made “in any event—either by AWN itself if there were no other applicants for reclaimed areas or by a competing provider seeking to serve the reclaimed area,” and that the Commission “should give its buildout rules, first proposed and adopted specifically for 700 MHz licenses, a chance to succeed.”<sup>60</sup> According to RWA, AWN’s indication of an “ability and willingness to construct facilities” to reach the 80 percent population coverage benchmark “in just three years demonstrates conclusively that it was the failure of the prior licensees to undertake any construction for more than seven years after license grant, and not application of the Commission’s build-out rules, that would be responsible for any delays in extending service [to] rural areas.”<sup>61</sup> RWA also contends that the *Waiver Order* “ignor[es] the constraints and policies embodied in the Commission’s general buildout rule”—Section 1.946—which states that the “Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transfer or assignee failed to construct”<sup>62</sup>—and asserts that the Bureau’s recent “Buildout Notice” reaffirms this policy.<sup>63</sup>

### III. DISCUSSION

14. We begin with an important premise. As with other Commission rules, requests to waive

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<sup>55</sup> *Id.* at 16.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* at 12.

<sup>59</sup> See generally RWA Reply to Opposition, WT Docket No. 16-402 (filed March 16, 2017) (RWA Reply).

<sup>60</sup> *Id.* at 5 n.6 (refuting as speculative AWN’s argument that an applicant for reclaimed area might be motivated by the prospect of reselling that license to AWN, arguing that the Commission “has in place and strictly enforces a longstanding policy to prevent such greenmail attempts” (citing 47 CFR § 1.935) and the licensee of that reclaimed area would have to construct 100% within one year of grant of the license).

<sup>61</sup> *Id.* at 4.

<sup>62</sup> *Id.* at 8 (citing 47 CFR § 1.946(e)(3)).

<sup>63</sup> *Id.* at 8-9 (citing *Wireless Telecommunications Bureau Reminds Wireless Licensees of Construction Obligations*, Public Notice, 32 FCC Rcd 4802 (WTB 2017) (Buildout Notice)). RWA adds that the Buildout Notice also made clear that buildout extensions “are permitted only in two situations,—either ‘involuntary loss of site’ or ‘other causes beyond [a licensee’s] control,’” neither of which, RWA asserts, is present in this case. See *id.*

the requirements of the wireless construction rules must “meet a high hurdle at the starting gate.”<sup>64</sup> In determining whether that standard is met, we must evaluate each case based on the specific circumstances that it presents. Under Section 1.925(b)(3)(i) of the Commission’s rules, the Commission may grant a rule waiver when the following two requirements are satisfied: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and (2) a grant of the requested waiver would be in the public interest.<sup>65</sup> Under Section 1.925(b)(3)(ii) of the Commission’s rules, the Commission may grant a rule waiver when, in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>66</sup> As discussed below, we deny RWA’s Application for Review and affirm the conditional waiver grant. Although a waiver applicant need only satisfy either Section 1.925(b)(3)(i) or (ii), here, based on our review of the entire record, we are persuaded that the specific circumstances of this case support the conditional grant of a waiver and a finding that AWN has satisfied the requirements of both Sections 1.925(b)(3)(i) and (ii), as independent bases to support the decision to grant the waiver. The totality of the circumstances specific to this case include, as discussed further below, the immense size of the License area, which covers the entire State of Alaska; extreme climate conditions, particularly in the northern portions of the State, resulting in an extremely short construction season; difficulty accessing many parts of the License area to deliver equipment and other supplies; lack of backhaul and other infrastructure; sparse population; and the extent to which the area covered by the License is rural.

15. It is well-established that the Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest,<sup>67</sup> and it may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>68</sup> In the *700 MHz Second Report and Order*, addressing the type of License subject to this Waiver Request, the Commission did not foreclose the granting of waivers in particular cases that satisfy the FCC’s waiver rules. Rather, the Commission anticipated that the type of waiver that AWN sought might be necessary in certain factual circumstances for the Lower 700 MHz band.<sup>69</sup> In fact, in the *700 MHz Reconsideration Order*, the Commission explained that “[f]or specific cases of hardship . . . providers can seek waiver relief” related to their construction obligations.<sup>70</sup> The Commission further explained that “requests must be well founded and not based solely on grounds of low population density,” and it directed staff to “consider these types of requests on a case-by-case basis,” as the Division did in this proceeding.<sup>71</sup>

16. Turning to the merits, we find that the circumstances of this case support affirming the Division’s conditional grant of the Waiver Request under either Section 1.925(b)(3)(i) or Section 1.925(b)(3)(ii) of the Commission’s rules. We conclude that relief, with conditions, is warranted given Section 27.14(g)(1)’s underlying purpose of bringing increased service to rural areas (as recognized under Section 1.925(b)(3)(i)) and the particular challenges of bringing advanced wireless services to the License area, which, as mentioned, is vast, remote, and prone to extreme weather and other considerations that pose particular challenges to construction (as recognized under Section 1.925(b)(3)(ii)). As discussed below, we have carefully reviewed the record before us and are unpersuaded by RWA’s arguments that the Division’s grant of relief to AWN “conflict[s] with FCC regulation, past precedent, and public policy”

<sup>64</sup> See *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972).

<sup>65</sup> 47 CFR § 1.925(b)(3)(i).

<sup>66</sup> 47 CFR § 1.925(b)(3)(ii).

<sup>67</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>68</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio I*); *Northeast Cellular*, 897 F.2d at 1166.

<sup>69</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, para. 153.

<sup>70</sup> *700 MHz Reconsideration Order*, 28 FCC Rcd at 2674, para. 6.

<sup>71</sup> *Id.*, 28 FCC Rcd at 2675, para. 9.



or that it “establishes a harmful precedent which should be overturned.”<sup>72</sup> Rather, in the context of the unique circumstances<sup>73</sup> and the public interest considerations presented, the Division’s grant of conditional waiver relief accords with applicable law and policy, and promotes Section 27.14(g)’s core purpose, namely, to foster the provision of new wireless services, especially in remote areas.

17. *Section 1.925(b)(3)(i).* We reject RWA’s claims that the Division ignored Section 27.14(g)(1)’s core purpose in granting the waiver under Section 1.925(b)(3)(i).<sup>74</sup> As noted above, RWA argues that the purpose of Section 27.14(g) is to prevent spectrum warehousing, and that the *Waiver Order* undermines that purpose by allowing AWN to retain the entire License area with limited geographic coverage.<sup>75</sup> While we agree that one policy underpinning Section 27.14(g) is to discourage spectrum warehousing, it is not the only policy the Commission sought to advance in adopting this rule. Rather, in the *700 MHz Second Report and Order*, the Commission stated that Section 27.14(g)’s underlying purpose is “to better promote access to spectrum and the provision of service, especially in rural areas.”<sup>76</sup> The Commission explained that Section 27.14(g)’s performance requirements “will provide all licensees with incentives to serve more rural communities” and “are the most effective way to promote rapid service to the public, *especially in rural areas*.”<sup>77</sup>

18. We concur with the Division that the relief granted in the *Waiver Order* furthers Section 27.14(g)’s purpose in the specific circumstances here by enabling AWN to bring new advanced wireless services to Alaskans living in remote areas of BEA171 that they might not receive absent the requested waiver.<sup>78</sup> The Commission defines a rural county as one with a population density of 100 persons or less per square mile, but as the Division explained, Alaska has a population density of just 1.2 persons per square mile;<sup>79</sup> it further explained that 28 of Alaska’s 29 boroughs and census areas (the equivalent of counties for statistical purposes)<sup>80</sup> meet the Commission’s definition of “rural,” and 15 have a population density of less than half a person per square mile.<sup>81</sup> Thus, to say that Alaska is “rural” is an understatement. Moreover, as the Division noted, the population of the State is “far-flung” across 663,209 square miles—more than twice the size of Texas,<sup>82</sup> with less than three percent of Texas’s population.

<sup>72</sup> Application for Review at 2. *See also id.* at 16 (characterizing the precedent as “dangerous”).

<sup>73</sup> We emphasize that we find a waiver is appropriate based on the totality of the factors specific to this case.

<sup>74</sup> Application for Review at 4-5. *See also* RWA Reply at 2, 3.

<sup>75</sup> Application for Review at 5, 8; RWA Reply at 12-13.

<sup>76</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, para. 153.

<sup>77</sup> *Id.*, 22 FCC Rcd at 15349, para. 155 (emphasis added).

<sup>78</sup> *See Waiver Order*, 32 FCC Rcd at 4728. We also note that the Division properly relied on Section 309 of the Communications Act of 1934, as amended (the Act) to support the waiver grant. *See Waiver Order*, 32 FCC Rcd at 4735. Section 309 directs the Commission to ensure “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas.” 47 U.S.C. § 309(j)(3).

<sup>79</sup> *See Waiver Order*, 32 FCC Rcd at 4732; 2010 State and Local Census Guide; U.S. Census Bureau, 2010 Census of Population and Housing, Population and Housing Unit Counts, Alaska: 2010 (June 2012), at 7, <https://www.census.gov/prod/cen2010/cph-2-3.pdf> (Alaska Population Counts).

<sup>80</sup> *See* U.S. Census Bureau, Alaska Boroughs and Census Areas, <http://live.laborstats.alaska.gov/pop/estimates/pub/chap2.pdf>.

<sup>81</sup> *See* Alaska Population Counts at 7.

<sup>82</sup> *Waiver Order*, 32 FCC Rcd at 4732. Texas comprises more than 268,585 square miles. *See* FCC’s Geographic Information Systems Database, <https://www.fcc.gov/general/geographic-information-systems>. *See also* U.S. Census Bureau, Guide to State and Local Census Geography - Selected Data from the 2010 Census, [https://www.census.gov/geo/reference/guidestloc/select\\_data.html](https://www.census.gov/geo/reference/guidestloc/select_data.html) (2010 State and Local Census Guide).

19. We agree with the Division's finding that service in the License area, particularly to those Alaskans living in the remote areas of BEA171, could be delayed absent the conditional waiver granted in this case, and that Section 27.14(g)'s purpose to promote access to spectrum and the provision of service, especially in rural areas, would in that case be frustrated by strict application of the rule to AWN under the circumstances here.<sup>83</sup> The Division's *Waiver Order* requires AWN to have provided coverage and offer service to at least 50 percent of BEA171's population by the December 13, 2016, interim construction deadline, which is 10 percentage points higher than the 40 percent interim population benchmarks for the Lower 700 MHz E Block and Upper C Block.<sup>84</sup> The *Waiver Order* also requires AWN to provide coverage and offer service to at least 80 percent of BEA171's population by June 13, 2019, a benchmark 10 percentage points higher than the 70 percent population benchmark required for the Lower 700 MHz E Block, and a higher population-based benchmark than required in any other commercial service.<sup>85</sup> Further, the *Waiver Order* requires AWN to maintain this 80 percent coverage until at least June 13, 2024.<sup>86</sup> If AWN fails to meet any of these benchmarks, its authorization for the License will automatically terminate, without Commission action, for those geographic portions of the License area in which AWN was not providing service by June 13, 2017—the accelerated end-of-license term for the License absent the Division's waiver of Section 27.14(g). AWN would in that case retain only what it had built as of June 13, 2017.<sup>87</sup>

20. As noted above, AWN filed its required notification stating that it had satisfied the 50 percent population coverage condition. As also noted above, AWN filed the requisite showing of its geographic area buildout as of June 13, 2017, consistent with the terms of the *Waiver Order*, ensuring that third parties and staff are able to determine the coverage as of that date in the event AWN fails to meet its other waiver conditions.

21. We reject RWA's contention that, because the Commission adopted geographic-based benchmarks for Lower A and B Block licenses—which are based on Economic Areas (EAs) and CMAs, rather than on generally larger REAGs—the rule's underlying purpose is undermined by the Division's decision permitting AWN to use population-based benchmarks for BEA171. The Commission emphasized that it was creating licenses in the Lower 700 MHz A and B Block “based on *smaller geographic service areas*, which would be more readily available to providers that tend to serve rural consumers,” and that the “keep-what-you-serve” allowed for the creation of even smaller areas.<sup>88</sup> Given the considerations identified here, we consider waiving the applicable buildout requirements and requiring the specified conditions instead to lead to an outcome comparable to that which the Commission envisioned for these other types of licenses.<sup>89</sup> Commission records show that the average size of a BEA is approximately 21,812 square miles, while the average size of a REAG is about 337,993 square miles.<sup>90</sup> AWN's License area is, as the Division observed, larger than nine of the 12 REAGs, and it is the same

<sup>83</sup> *Waiver Order*, 32 FCC Rcd at 4735.

<sup>84</sup> *Id.* See *Interoperability Order*, 28 FCC Rcd at 15148, para. 57 (all active Lower 700 MHz band E Block licensees may meet their interim construction benchmark by providing signal coverage and offering service to at least 40 percent of its total E Block population.); 47 CFR § 27.14(h) (Upper 700 MHz C Block licensees are required to provide reliable service sufficient to cover 40 percent of the population of their license areas within four years.).

<sup>85</sup> *Id.*, 32 FCC Rcd at 4735-36. See, e.g., 47 CFR §§ 24.203 (PCS), 27.14(s) (AWS-1).

<sup>86</sup> *Id.*, 32 FCC Rcd at 4736.

<sup>87</sup> *Id.*, 32 FCC Rcd at 4735-36.

<sup>88</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15348-49, paras. 155-56 (emphasis added).

<sup>89</sup> See *700 MHz Reconsideration Order*, 28 FCC Rcd at 2674, para. 6.

<sup>90</sup> See FCC's Geographic Information Systems Database, <https://www.fcc.gov/general/geographic-information-systems>.

size as REAG7, which comprises, like BEA171, the entire State of Alaska.<sup>91</sup> RWA also implies that the Division essentially has allowed AWN to use the waiver process to pick and choose the buildout options it likes best in contravention of the benchmark the Commission explicitly selected.<sup>92</sup> We disagree. While we reemphasize that our waiver process is not one to be taken lightly, we also reiterate that the Commission's 700 MHz *Reconsideration Order* specifically anticipated the need for this type of waiver in certain circumstances, and in this instance, application of different buildout requirements and conditions will improve the prospects for the provision of service to consumers.

22. In the *Waiver Order*, the Division carefully considered the record before it and reasonably found that a waiver would serve the public interest by fostering the provision of new wireless services to Alaskans.<sup>93</sup> In weighing the public interest, the Division correctly concluded that a waiver would afford AWN the needed flexibility to "cover remote areas more effectively, especially in underserved and rural communities where . . . national carriers do not have service."<sup>94</sup> Alaska ranks last in the United States for access to broadband service with a speed greater than 25 Mbps.<sup>95</sup> The 80-percent population coverage requirement ensures that AWN must deploy in rural areas of Alaska. As noted by the Division, even to achieve coverage of 68.8 percent of Alaska's population, a percentage that falls far short of the 80-percent benchmark, "AWN would have to serve all 149 incorporated cities in Alaska—90 of which have less than 500 persons (and 21 of which have less than 100 persons) . . ."<sup>96</sup> The Division also noted that AWN committed in the *Alaska Plan* proceeding to bring new LTE service to more than 100,000 Alaskans living in "remote areas"<sup>97</sup> that are otherwise largely without LTE coverage, demonstrating that AWN will use its 700 MHz spectrum to provide this new LTE service.<sup>98</sup> In addition, the Division appropriately took note of the Commission's finding in the 700 MHz proceeding that population-based benchmarks are well suited to larger areas, and we agree with the Division's finding that granting a waiver in the specific circumstances here is thus consistent with the Commission's objective of ensuring intensive spectrum use, which serves the public interest.<sup>99</sup>

23. RWA emphasizes its view that the waiver relief is not necessary for expansion of service within Alaska because AWN can reapply for any license areas it loses pursuant to Section 27.14(g)(2)'s

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<sup>91</sup> See FCC's Geographic Information Systems Database, <https://www.fcc.gov/general/geographic-information-systems>; FCC, Auctions, Maps, <http://wireless.fcc.gov/auctions/data/maps/REAG.pdf>.

<sup>92</sup> RWA Reply at ii.

<sup>93</sup> See *Waiver Order*, 32 FCC Rcd at 4728, 4731, and 4735.

<sup>94</sup> *Id.*, 32 FCC Rcd at 4733.

<sup>95</sup> See Nat'l Telecommunications & Info. Admin., U.S. Dep't of Commerce, U.S. Broadband Availability: June 2010 - June 2012, at 12, tbl. 5 (May 2013), [http://www.ntia.doc.gov/files/ntia/publications/usbb\\_avail\\_report\\_05102013.pdf](http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf).

<sup>96</sup> *Waiver Order*, 32 FCC Rcd at 4733 (citing U.S. Census Bureau, Population Division, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015, (release date May 2016), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>).

<sup>97</sup> "Remote areas" in Alaska are all areas of Alaska "other than the study areas, or portions thereof, that include the three major cities in Alaska with over 30,000 in population, Anchorage, Juneau, and Fairbanks." *Alaska Plan*, 31 FCC Rcd at 10160, para. 68 (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17835, para. 529 n.876, 17834, para. 526 n.872; 47 CFR § 54.307(e)(3)(i)).

<sup>98</sup> See *Waiver Order*, 32 FCC Rcd at 4734 (citing *Alaska Plan Commitments Public Notice*, 31 FCC Rcd at 13322; General Communication, Inc. Coverage Map, <http://gci.cellmaps.com/>; Alaska Population Counts at 7; and U.S. Census Bureau, American Factfinder, Community Facts, [https://factfinder.census.gov/nav/jsf/pages/community\\_facts.xhtml?src=bkmk#](https://factfinder.census.gov/nav/jsf/pages/community_facts.xhtml?src=bkmk#)).

<sup>99</sup> See *id.*, 32 FCC Rcd at 4733.

“keep-what-you-serve” rule once third parties have a chance to do so first.<sup>100</sup> As noted above, however, we agree that, absent a waiver, the provision of wireless services to Alaskans in BEA171, especially those residing in particularly remote areas, could be delayed, particularly in light of Alaska’s uniqueness, which we discuss further below. Serving the remote areas of BEA171—areas with inordinately sparse and far-flung population, and a notable lack of existing infrastructure—is extremely challenging. AWN, with tailored waiver relief, is uniquely well-positioned to build upon its investments and experience in providing service to BEA171’s population and to quickly expand service to communities that might otherwise not receive service. The Division therefore appropriately concluded that, on balance, the relief granted with conditions in the *Waiver Order* serves the public interest in Alaska.

24. In its Application for Review, RWA for the first time challenged the requirement that AWN negotiate in good faith with any third party seeking to acquire or lease spectrum in a geographic area of BEA171 not served by AWN.<sup>101</sup> While RWA may consider this condition to be of little value, RWA’s comments about the availability of good faith negotiation opportunities do not in any way undercut our approval of the waiver relief granted by the Division. The Division strengthened what AWN had proposed in its Waiver Request, requiring good-faith negotiations not only during renewal terms, but also during the remainder of the initial license term, and not only with respect to leases, but also with respect to any third party seeking to *acquire* AWN’s unused spectrum in the License area.<sup>102</sup> The Division also specified that, “[b]y way of example, good faith negotiations require, among other things, reasonable, market-based rates.”<sup>103</sup> We have required good faith negotiations in many contexts,<sup>104</sup> and we stand ready to enforce this condition should any entity seeking to negotiate with AWN for access to unserved area in BEA171 encounter what appears to be negotiations that are anything less than “in good faith.” To the extent that even negotiations conducted in good faith do not guarantee that an RWA member will be able to use the spectrum to supply service, the same would hold true of re-auctioning the spectrum, which is the outcome that RWA members seek in urging us to overturn this waiver. For these reasons, we reject RWA’s argument.

25. *Section 1.925(b)(3)(ii).* Given, among other considerations, the immense size of the License area (covering the entire state of Alaska), extreme climate conditions that result in an extremely short construction season, difficulty accessing many parts of the License area to deliver equipment and other supplies, the lack of backhaul and other infrastructure, sparse and far-flung population, and (as mentioned above) the extent to which the area covered by the License is rural, we also agree with the Division’s findings that, “in view of the unique challenges of serving Alaska . . . , strict application of Section 27.14(g) here would be contrary to the public interest.”<sup>105</sup> RWA disputes the uniqueness of Alaska as a basis for the waiver, asserting that its members “serve other remote rural areas of the country that present similar challenges and these members have worked diligently to meet the Commission’s

<sup>100</sup> See Application for Review at 11-13; RWA Reply at 4-6.

<sup>101</sup> See Application for Review at 14-16; *Waiver Order*, 32 FCC Rcd at 4736. AWN had voluntarily committed in support of its Waiver Request to negotiate in good faith with any third party seeking to lease spectrum in any area not being served by AWN. See Waiver Request at 8-9. In its Reply Comments, RWA did not challenge this commitment as being of little value.

<sup>102</sup> See *Waiver Order*, 32 FCC Rcd at 4736.

<sup>103</sup> *Id.*, 32 FCC Rcd at 4736 n.81.

<sup>104</sup> E.g., 47 CFR §§ 27.1216(b) (negotiations between BRS and grandfathered EBS licensees), 20.23(a) (negotiations regarding deployment of a Contraband Interdiction System in a correctional facility), 51.301(a), (b) (negotiations between an incumbent local exchange carrier and a requesting telecommunications carrier regarding interconnection and other specified agreements), 90.677 (800 MHz transition to separate cellular and non-cellular operations), and 101.73 (relocation of fixed service licensees from the AWS bands).

<sup>105</sup> See *Waiver Order*, 32 FCC Rcd at 4730.

construction deadlines.”<sup>106</sup> While RWA’s members may have worked diligently to meet their buildout deadlines in difficult license areas, we disagree that Alaska is not unique. The challenges of bringing widespread service to Alaska are not present in any other state to the same degree, and, as the Division stated, “the many unique circumstances attendant to serving BEA171 . . . make it impracticable to meet the applicable geographic construction requirements.”<sup>107</sup>

26. In the *Alaska Plan*, the Commission found that carriers in Alaska face unique conditions due to “its remoteness, lack of roads, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul availability, extreme weather conditions, challenging topography, and short construction season.”<sup>108</sup> The Division delineated additional details about Alaska, explaining that it is “a land of atypical geography, with hundreds of islands, many undeveloped, vast mountain ranges, including America’s highest peak, Denali, and a mean winter temperature of 4° F (-13° F in the north, with certain parts averaging -20 to -30° F).”<sup>109</sup> The Division also observed that “[t]ravel in Alaska can be extraordinarily difficult: many areas can only be reached by aircraft,<sup>110</sup> and others only by Alaska’s famed ice roads in the winter months.”<sup>111</sup>

27. In view of that combination of unique circumstances, we agree with the Division that strict application of Section 27.14(g) would be contrary to the public interest. In addition, we find that the unique facts presented by AWN fit within the ambit of “specific cases of hardship” envisioned by the Commission in the *700 MHz Reconsideration Order* as potential grounds for waiving construction requirements based on geographic benchmarks.<sup>112</sup>

<sup>106</sup> Application for Review at 7.

<sup>107</sup> *Waiver Order*, 32 FCC Rcd at 4731.

<sup>108</sup> See *supra* note 5.

<sup>109</sup> *Waiver Order*, 32 FCC Rcd at 4731-32 (citing Western Regional Climate Center, Climate of Alaska, <http://www.wrcc.dri.edu/narratives/ALASKA.htm>; National Park Service, Denali, <https://www.nps.gov/dena/index.htm>; National Oceanic and Atmospheric Administration, Climate at a Glance, <https://www.ncdc.noaa.gov/cag/>; and University of California Museum of Paleontology, The Tundra Biome, <http://www.ucmp.berkeley.edu/exhibits/biomes/tundra.php#arctic>).

<sup>110</sup> *Id.*, 32 FCC Rcd at 4732 (citing Alaska Public Lands Information Center, Statewide FAQs, [https://www.alaskacenters.gov/faqs.cfm#CP\\_JUMP\\_15483](https://www.alaskacenters.gov/faqs.cfm#CP_JUMP_15483); State of Alaska, Transportation, <http://alaska.gov/kids/learn/transportation.htm>).

<sup>111</sup> *Id.* (citing National Oceanic and Atmospheric Administration, Pacific Marine Environmental Laboratory, Land – Roads, <http://www.pmel.noaa.gov/arctic-zone/detect/land-road.shtml?page=land>).

<sup>112</sup> *700 MHz Reconsideration Order*, 28 FCC Rcd at 2674, para. 6. In a recent *ex parte* filing, RWA argues that the Division’s decision to deny a licensee’s request for a population-based alternative final benchmark for two Lower 700 MHz band licenses in American Samoa where, according to RWA, the buildout challenges are “virtually identical to those faced by AWN” here, “mandate that RWA’s application for review be granted” in the instant case. *Ex Parte* Letter from Caressa D. Bennet, General Counsel, RWA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-402, at 2 (filed Nov. 30, 2017) (citing *AST Telecom, LLC d/b/a Bluesky, Request for Waiver of Interim and Final Geographic Construction Benchmarks for Lower 700 MHz Band A and B Block Licenses WQJQ800 and WQOU674 in American Samoa*, ULS File Nos. 0007595216 and 0007597075, 32 FCC Rcd 9307 (WTB Mobility Div. 2017)). See also *id.* at 1 (asserting that the circumstances in the instant case are “far less compelling than those involved in the Bluesky decision”). RWA asserts that AWN and Bluesky are similarly situated and that AT&T’s waiver request should be denied for the same reasons as the Bureau articulated in its decision to deny a waiver to Bluesky. In its effort to lump together Alaska and American Samoa for purposes of assessing requests for waiver of Section 27.14(g), RWA ignores a fundamental difference between the two areas: AWN’s License Area is 663,209 square miles in contrast to Bluesky’s American Samoan license areas, which cover about 551 square miles. The challenges associated with buildout in this licensed area in Alaska are therefore much more significant than the specific areas in American Samoa covered by the Bluesky licenses, and in this regard, AWN and Bluesky are not similarly situated. A waiver is thus appropriate in the instant situation.

28. RWA argues that AWN's ability to regain lost portions of its License area pursuant to Section 27.14(j)(2) also weighs against a waiver grant under Section 1.925(b)(3)(ii) because the "only advantage AWN would lose is the ability to keep other providers from serving the unserved portions of BEA171 . . . ."<sup>113</sup> This concern is not controlling to our determination, however. Rather, our concern under Section 1.925(b)(3)(ii) is whether, in view of the unique factual circumstances present here, application of the rule would be contrary to the public interest. With our focus on the public interest standard, we conclude that the Division correctly found that strict application of Section 27.14(g) would be contrary to the public interest for purposes of its analysis of the appropriateness of grant of a waiver under Section 1.925(b)(3)(ii).

29. We now turn to RWA's claims that the *Order* establishes a harmful or even dangerous precedent.<sup>114</sup> The tailored relief granted to AWN does not dilute Section 27.14(g)(1) or any other Commission rule. As explained above, licensees must clear a high hurdle in seeking to obtain a waiver of our construction rules and, given the consequences of failing to meet that standard, the Commission has created appropriate incentives to comply with its buildout obligations. At the same time, it has long been the case that the Commission may waive a rule when it finds that the purpose of the rule is better served by another, more effective implementation of overall policy on an individual basis.<sup>115</sup> As to the License that is the subject of the instant Waiver Request, the Commission specifically envisioned that requests for waiver of Section 27.14(g)(1) would be considered case-by-case, as noted above. We conclude that a waiver is warranted under the totality of the circumstances presented, including those identified in the *Waiver Order*. We will continue to review any requests for waiver carefully considering the specific facts of each case, including the scope of the requested waiver.

30. *Section 1.946(e)(3)*. Finally, we address RWA's claims that, despite AWN seeking waiver of Section 27.14(g)(1) solely pursuant to Section 1.925(b)(3), and the Division finding that a waiver was warranted under that rule, the Division was required to address the constraints and policies embodied in the Commission's build-out rule, Section 1.946(e)(3), which states that the "Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct."<sup>116</sup> RWA's argument conflates the standard for an extension under Section 1.946 with that for waiver under Section 1.925(b)(3). The Division explained that, as a general matter, the licensee is obliged to confirm that it can satisfy construction and service requirements in advance of acquiring spectrum,<sup>117</sup> but this does not obviate the Commission's waiver authority under Section 1.925(b)(3), and indeed, RWA cites no authority to suggest that Section 1.946 bars the Division from exercising its discretionary waiver authority under Section 1.925(b)(3).<sup>118</sup>

31. In granting AWN a limited waiver with several performance conditions, the Division took a hard look at the combination of factors in this case, and we find that both AWN's request and the Division's decision were well-founded, "not based solely on grounds of low population density" and, moreover, not based at all on the prior licensees' failure to construct. We take this opportunity to remind licensees and prospective licensees of the policy underlying Section 1.946(e)(3), but we find that the policy is in no way undermined by the Division's decision to afford AWN limited, conditional waiver

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<sup>113</sup> Application for Review at 14.

<sup>114</sup> See *id.* at 2, 16.

<sup>115</sup> *WAIT Radio I*, 418 F.2d at 1159.

<sup>116</sup> See RWA Reply at 8-9 (citing 47 CFR § 1.946(e)(3)).

<sup>117</sup> *Waiver Order*, 32 FCC Rcd at 4731.

<sup>118</sup> We note RWA's argument that "[t]his is not a case of hardship" under Section 1.925(b)(3)(i) because "the spectrum was allowed to lie fallow for seven and one-half years" by Triad (the original licensee) and T-Mobile, see Application for Review at 8, but the failure of prior licensees to construct is not determinative of whether a current licensee has satisfied the standard for waiver relief, which we evaluate case by case.

relief here.<sup>119</sup> We reiterate a crucial point stated above: in the *700 MHz Second Report and Order*, the Commission did not foreclose the granting of waivers in particular cases that satisfy the FCC's waiver rules, and anticipated that the type of waiver that AWN sought might be necessary in certain factual circumstances for the Lower 700 MHz band.<sup>120</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

32. In sum and for the above reasons, we find that the specific circumstances and public interest benefits present here support a conditional waiver of Section 27.14(g)(1). We therefore deny RWA's Application for Review.

33. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 CFR § 1.115, the Application for Review filed by the Rural Wireless Association, Inc. on July 6, 2017, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>119</sup> See also *Waiver Order*, 32 FCC Rcd at 4736 n.81 (stating that the "waiver relief will not automatically transfer if AWN seeks to assign, partition, or disaggregate spectrum under the License to a third party. Rather, the third party must demonstrate that the waiver relief should transfer, and the Bureau may, in its discretion, grant, modify, or reject such relief.").

<sup>120</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, para. 153.